MAR 11 1969
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

**October Term, 1968**

**No. [redacted] # 7**

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

*Plaintiffs-Appellants,*

*v.*

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Defendants-Appellees.*

**No. [redacted] 29**

FRED FERNANDEZ,

*Plaintiff-Appellant,*

*v.*

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Defendants-Appellees.*

**On Appeal from the United States District Court for the Southern District of New York**

## BRIEF FOR APPELLEE MACKELL

THOMAS J. MACKELL
*District Attorney of Queens County*
125-01 Queens Boulevard
Kew Gardens, New York 11415
*Appearing pro se*

FREDERICK J. LUDWIG
*Chief Assistant District Attorney*
*Of Counsel*

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| INTRODUCTION | 1 |
| STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| THE INDICTMENT | 4 |
| SUMMARY OF ARGUMENT | 7 |
| ARGUMENT: | |
| POINT I—Injunctive and declaratory relief sought is prohibited by Act of Congress in this criminal proceeding instituted in good faith and contested and pending in a State court long before application for federal court intervention | 9 |
| POINT II—Apart from any prohibition by Act of Congress, the federal court in the exercise of discretion should abstain from intervening in this proceeding at this time | 22 |
| i No "chilling effect" upon future exercise of First Amendment rights by appellants or anyone else could occur under circumstances where the State statutes complained about were repealed and narrowly construed before the instant indictment was returned | 25 |
| ii The prosecution was instituted and conducted in good faith in all respects | 28 |
| POINT III—The challenged statutes, as construed by the highest court of the State prior to this indictment and as applied to the facts of these cases, are constitutional | 32 |

PAGE

POINT IV—The indictment explicitly charging activities directed against "the governments of the State of New York and its various political subdivisions and agencies" does not constitute State action preempted by federal legislation 38

POINT V—A property qualification for jurors—never observed in their selection for a generation and since repealed—does not justify federal intervention by injunction or declaratory judgment in the middle of State court criminal proceedings ..... 41

CONCLUSION ..... 43

APPENDIX A—Statutes Involved ..... A1

APPENDIX B—Pleas, Applications and Motions Addressed to Original Indictment ..... A12

APPENDIX C—Pleas, Applications and Motions Addressed to Superseding Indictment ..... A15

## TABLE OF AUTHORITIES

***Cases:***

Baggett v. Bullitt, 377 U.S. 360 (1964) ..... 12, 13

Brooks v. Briley, 391 U.S. 351 (1968), *affirming* 274 F.Supp. 538 (M.D. Tenn. 1967) ..... 17, 21

Cameron v. Johnson, 390 U.S. 611 (1968), *affirming* 262 F.Supp. 873 (S.D. Miss. 1966) ..... 15, 17, 18, 24

Commonwealth v. Nelson, 377 Pa. 58, 104 A. 2d 133 (1954) ..... 39

PAGE

De Gregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966) ..... 40
Dennis v. United States, 341 U.S. 494 (1951) ..... 26, 33, 35, 36, 37, 41
Dollar Co. v. Canadian Car & Foundry Co., 220 N.Y. 270 (1917) ..... 36
Dombrowski v. Pfister, 380 U.S. 479 (1965) ..... 12, 13, 15, 18, 23, 25, 41, 42
Douglas v. City of Jeannette, 319 U.S. 157 (1943) ..... 12, 22

Estes v. Texas, 381 U.S. 534 (1965) ..... 30
Ex Parte Young, 209 U.S. 123 (1908) ..... 11, 14
Ex Parte Quirin, 317 U.S. 1 (1942) ..... 37

Frohwerk v. United States, 249 U.S. 204 (1919) ..... 33

Gitlow v. New York, 268 U.S. 625 (1926) ..... 35, 36
Golden v. Zwickler, — U.S. —, 37 LW 4185 (1969) 21, 27
Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 294 (1943) ..... 21

Hill v. Martin, 296 U.S. 393 (1935) ..... 10
H. J. Heinz Co. v. Owens, 189 F. 2d 505 (9th Cir. 1951), cert. den. 342 U.S. 905 (1952) ..... 18

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 12, 13, 26, 37

Meyer v. Nebraska, 262 U.S. 390 (1923) ..... 42

Oklahoma Packing Co. v. Oklahoma Gas & Electric, 309 U.S. 4 (1940) ..... 17

Pennsylvania v. Nelson, 350 U.S. 497 (1956) ..... 39, 40
People v. Epton, 19 NY 2d 496 (1967) ..... 26, 34, 35, 37, 38, 40
People v. Finkelstein, 9 NY 2d 342 (1961) ..... 36
People v. Gitlow, 268 U.S. 625 (1926) ..... 35, 36

PAGE

People v. Kourouma, 159 N.Y.L.J. No. 53, March 18, 1968, p. 1, col. 3, 21, cols. 2-5; 2 Cr. L. 2490-2492 (March 27, 1968) ..... 28, 30

Railroad Commission v. Pullman Co., 312 U.S. 496, 500 (1941) ..... 23
Robertson v. Baldwin, 165 U.S. 275, 281 (1897) ..... 33

Samuels et al. v. Mackell, 288 F. Supp. 2d 348 (S.D.N.Y. 1968) ..... 43
Schenck v. United States, 249 U.S. 47 (1919) ..... 33, 35, 41
State v. Givens, 28 Wis. 2d 105, 135 N.W. 2d 780 (1965) ..... 26
Stefanelli v. Minard, 342 U.S. 111 (1951) ..... 12
Strauder v. West Virginia, 100 U.S. 303 (1879) ..... 41
Shaw v. Garrison, —— U.S. ——, 89 S.Ct. 453, 21 L.ed. 2d 392 (1968) ..... 18, 21

Terrace v. Thompson, 263 U.S. 197, 214 (1923) ..... 23

United States v. Carolene Products Co., 304 U.S. 144. (1938) ..... 12
Uphaus v. Wyman, 360 U.S. 72 (1959) ..... 39

Valentine v. Chrestensen, 318 U.S. 52 (1942) ..... 33

Winters v. New York, 333 U.S. 507 (1948) ..... 37

Yates v. United States, 354 U.S. 298 (1957) ..... 26, 35, 36, 41

Zwicker v. Boll, 391 U.S. 353 (1968), *affirming* 270 F. Supp. 131 (W.D.Wis. 1967) ..... 16, 26
Zwickler v. Koota, 389 U.S. 241 (1967) ..... 19
Zwickler v. Koota, 290 F. Supp. 244 (1968) ..... 27

PAGE

***Statutes:***

Constitution of the United States of America:

Amendment I ..... 3, A10
Amendment XIV ..... 3, A10
Article VI ..... 3, A10

United States Code:

18 U. S. C. §2385 ..... 3, A11
28 U. S. C. §2201 ..... 3, 20, A11
28 U. S. C. §2283 ..... 10, 11, 14, 15, 16, 17, 21, A10
42 U. S. C. §1983 ..... 10, 15, 14, 16, 20, A10

New York Penal Law (former)

§1896 Subd. 3 ..... 2, A2
§1896 Subd. 11 ..... 2, 5, A4
§1896 Subd. 12 ..... 2, 5, A4
§1897 Subd. 2 ..... 2, 5, 32, A1
§1897 Subd. 3 ..... 2, 5, 32, A2
§1897 Subd. 9 ..... 2, 5, 32, A3
§160 ..... 2, 5, 32, 34, A5
§161 Subd. 1 ..... 2, 5, 6, 32, 34, A5
§161 Subd. 2 ..... 2, 5, 6, 32, 34, A5
§161 Subd. 4 ..... 2, 5, 6, 32, 34, A5
§163 ..... 2, 32, 34, A5
§223 ..... 3, 32, A6
§580 Subd. 1 ..... 3, 32, A6
§580-a ..... 3, 32, A6

New York Penal Law:

§265.00 Subd. 3 ..... 2, A2
§265.00 Subd. 11 ..... 2, A5
§265.00 Subd. 12 ..... 2, A5
§265.05 Subd. 2 ..... 2, A2
§265.05 Subd. 3 ..... 2, A3
§265.05 Subd. 9 ..... 2, A4
§240.15 ..... 3, 34, A6

PAGE

New York Code of Criminal Procedure:

§295-b ..... 3, A7
§295-c ..... 3, A7
§295-d ..... 3, A7
§295-e ..... 3, A8
§279 ..... 3, A8
§295-g ..... 3, A9

New York Judiciary Law:

§596 Subd. 3 (repealed) ..... 3, 42, A9

***Monographs:***

INTERNAL SECURITY AND SUBVERSION, *American Law Division, Library of Congress* (1965) ..... 40

Role of the Prosecutor in a Fair Trial, 41 *Minn. L. Rev.* 602 (1958) ..... 42

# Supreme Court of the United States

**October Term, 1968**

**No. 580**

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

*Plaintiffs-Appellants,*

*v.*

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Defendants-Appellees.*

**No. 813**

FRED FERNANDEZ,

*Plaintiff-Appellant,*

*v.*

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Defendants-Appellees.*

**On Appeal from the United States District Court for the Southern District of New York**

## BRIEF FOR APPELLEE MACKELL

### Introduction

This is a direct appeal from a judgment of a three-judge District Court dismissing complaints seeking relief in form

of injunction and declaratory judgment. The appellants are defendants in a criminal action pending in a State court since June 20, 1967. Jurisdiction of the federal court was invoked nine months later, on March 12, 1968 on grounds that the statutes under which they are accused are vague and overbroad. The appellee sought to be restrained from continuing the proceeding is District Attorney of the county of Queens in New York.

## Statutes

Eleven distinct provisions of statutes are explicitly referred to in the challenged indictment, and these are all sections of the New York Penal Law—since repealed in its entirety—that were in force and effect at the time of commission: [i] §1897, subd. 2, prohibiting possession of loaded handguns; [ii] §1897, subd. 3, prohibiting possession of handguns, whether loaded or not; [iii] §1897, subd. 9, prohibiting possession of other weapons, provided there is intent to use the same unlawfully against another. For the sake of clarity, definitions of "firearm" [§1896, subd. 3], "rifle" [*id.*, subd. 11], and "shotgun" [*id.*, subd. 12] should also be read in connection with the first three provisions. Comparable provisions of the current Penal Law should also be considered for the same reason [§§265.05, subd. 2, 3 and 9; 265.00, subd. 3, 11 and 12]; [iv] §160, defining criminal anarchy; [v] §161, subd. 1, defining one method of advocating criminal anarchy; [vi] §161, subd. 2, defining another such method; [vii] §161, subd. 4, defining still another such method; [viii] §163, making a misdemeanor to permit premises to be used for assemblages

of anarchists. For the sake of clarity, a single provision of the current Penal Law, §240.15, incorporates all of the provisions of the repeated statutes; [ix] §580, subd. 1, defines conspiracy as a misdemeanor; [x] §580-a defines the same crime as a felony; and [xi] §223, defining arson.

The only State court pleading before the Court is the indictment. The rules governing the statement of the crime charged and the requirements for joinder of interrelated counts are set forth in the New York Code of Criminal Procedure §§295-b, 295-c, 295-d, 295-e, 279 and 295-g.

The only other New York statute involved is a provision of the Judiciary Law, §596, subd. 3, since repealed.

Provisions of the Constitution invoked on this appeal are the Supremacy Clause [Art. 6], and the First and Fourteenth Amendments. Federal statutes involved are the prohibition against stays of State court proceedings [28 U.S.C. §2283], the Civil Rights Act [28 U.S.C. §1983], the Smith Act [18 U.S.C. §2385], and the Declaratory Judgment Act [28 U.S.C. §2201].

Unless these provisions are set forth in the appendix of either brief of the appellants, they are reproduced in Appendix A, *post*, at A1.

## Statement of the Case

The events leading to the return of the indictment challenged on this appeal are recited in the testimony of a detective of the Police Department of the City of New York given on June 20, 1967 before the grand jury that indicted

the appellants, and upon other evidence. Substantially the same testimony was given in open court by the same detective on June 4, 5, 6, 10, 11 and 12, 1968, at the trial of two of the appellants [Harris and Ferguson] upon a related indictment for conspiracy to murder returned by the same grand jury on the same day.

The substance of this testimony was that between October 1, 1965 and June 20, 1967, this detective became a member of an organization called the Black Brotherhood Improvement Association. In October, 1966, the murder of several civil rights leaders was planned. In November, 1966, a target area in Queens County was marked out on a map. Gasoline and drums of oil were to be placed at strategic locations. In event of riot, these were to be poured into designated streets and subways and set aflame, in order to paralyze local government. Electrical power was to be cut off at a designated location for the same purpose. Guns and ammunition were amassed in February, 1967 and distributed in late March, 1967, for the same end.

The trial of Harris and Ferguson before a Justice and jury in the Supreme Court of the State of New York has resulted in their conviction for conspiracy to commit murder, as indicted.

**The Indictment**

The challenged indictment was found by a grand jury of twenty-two persons on June 20, 1967, and superseded by the same body on January 15, 1968 (No. 813, 16-34). It contains 47 counts (No. 580, 9a-31a)*. The overwhelm-

* References throughout in parenthesis preceded by a case number are to pages in the indicated printed APPENDIX of appellants.

ing number of these counts—41 in all [counts 8 through 48] —charge possession of handguns and shoulder guns in violation of the former Penal Law §1897, subd. 2, 3 and 9. Only two of those counts relate to defendants who are not appellants in this proceeding [counts 32 and 33]. The remaining 39 counts charge eight appellants with unlawful possession of guns.

Subdivision 2 of this section makes criminal the possession of loaded handguns, without proof of intent to use unlawfully against another. This is the basis of one charge against a single appellant (Ferguson) [count 13]. Subdivision 3, of the same section, makes criminal the possession of handguns, whether loaded or not, and like subdivision 2, requires no proof of intent to use unlawfully. This subdivision is the basis of three charges against three appellants (Ellis, Harris and Samuels) [counts 8, 28 and 42].

The remaining counts dealing with weapons—37 in all —are brought under subdivision 9 of §1897. These relate to "other weapons" which include rifles and shotguns [§1896, subd. 11, 12]. These crimes specifically require proof of "intent to use the same unlawfully against another".

The unlawful intent required for indictment for these crimes has been supplied by the design of the appellants to overthrow State and local government by force and violence, as such overthrow is defined in §§160 and 161, subdivisions 1, 2 and 4. Eight appellants are charged in 35 counts with these crimes [counts 9-12, 14-27, 29-41, 43-48].

Six counts deal with various aspects of criminal anarchy. Two of these counts separately charge the misde-

meanor of permitting different premises to be used for assemblages of anarchists against two appellants respectively (Samuels and Stewart) [counts 6 and 7]. The remaining four counts charge all appellants with advocacy of criminal anarchy (§§160, 161, subd. 1, 2 and 4) and the misdemeanor of conspiracy to engage in such advocacy (§§580, subd. 1, 161, subd. 1, 2 and 4) [counts 1-4].

These counts emphatically qualify the conduct charged as criminal as being engaged in "with the further intent that said acts be presently attempted and accomplished (No. 580, 10a 11a, 12a, 14a). These counts identify the target of the advocacy as "the governments of the State of New York and its various political subdivisions and agencies, * * * against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, * * *" (*Ibid.*). The means of accomplishing the overthrow is explicitly stated, "by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline" (No. 580, 10a, 11a, 12a, 13a, 14a), and "by sabotage of public transportation and communication facilities" (No. 580, 11a, 13a).

Seven overt acts are alleged in furtherance of the conspiracy to advocate under subdivision 1 of §161, four under subdivision 2, and eight under subdivision 4 (No. 580, 14a-17a).

A final count charges conspiracy to commit arson in third degree against eight appellants and alleges five overt acts [count 5] (No. 580, 17a-18a).

The form and content of the indictment are governed by statutory procedural rules contained in New York Code of Criminal Procedure §§295-b, 295-c, 295-d, 295-e, 279, and 295-g. These rules control not only the sufficiency of the statement of the crime but also the circumstances under which counts may be joined in a single indictment.

## Summary of Argument

1. The 175 year old prohibition by Act of Congress against federal court intervention in State court proceedings begun and pending has been observed without exception by this Court. The century old Act of 1871 would constitute an exception so broad as to swallow the rule of prohibition. The instant case involves nine months of proceedings in the State tribunal initiated by almost three score applications of appellants, and offers no suitable situation for any modification of this rule.

2. Apart from prohibition, abstention is especially indicated under circumstances ruling out any "chilling effect" upon future First Amendment rights. These circumstances include repeal of the entire Penal Law prior to the finding of the indictment as well as a narrowing construction made by the highest court of the State, also before return of the indictment. No evidence of bad faith was found by the court below, and it is clear from the pending proceedings in the State court that the prosecution was instituted and conducted in good faith.

3. The indictment is aimed, not at any discussion or publication but rather at the accumulation of an arsenal

for the purpose of overthrowing State and local government. The overwhelming number of counts in the indictment deal with possession of weapons. The overwhelming number of these counts require proof of unlawful intent. The unlawful intent is not predicated upon usual purpose of robbery or assault but rather overthrow of local government by force and violence. The indictment incorporates the "clear and present danger" test, and was found subsequent to a narrowing construction embodying that test by the highest court of the State.

4. The indictment explicitly charges planned use of weapons, bombs and ignited gasoline against executive officials and peace officers of State and local government, and also against transportation and other facilities both owned and operated by local government. Such activities are not likely to constitute a field preempted by the federal government

5. A property qualification for jurors that was never observed in their selection and since repealed does not justify federal intervention by injunction or declaratory judgment in the middle of State court proceedings. This is particularly the case in the absence of any showing whatsoever of discrimination on any basis in the selection of a single juror.

## POINT I

**Injunctive and declaratory relief sought is prohibited by Act of Congress in this criminal proceeding instituted in good faith and contested and pending in a State court long before application for federal court intervention.**

The State criminal proceeding sought to be adjudicated by extraordinary remedy of injunction or declaratory judgment to be made by a federal district court was commenced by indictment of a grand jury of a State tribunal on June 20, 1967. Complaints in the federal District Court were filed on behalf of appellants on March 12, 1968—265 days after commencement of the State criminal proceeding. During that period, each appellant pleaded twice in the State Court—once to the original indictment and a second time to a superseding indictment. In addition, a total of more than 58 formal motions and applications were made in the State Court by the eleven appellants as well as by six other defendants, under both the original and superseding indictment. Each of these motions and application was disposed of by a State Supreme Court Justice [Appendices B and C, *post*, at A12].

Moreover, a related indictment, similarly superseded, charged two of the appellants [Ferguson and Harris] with conspiracy to commit the crime of murder in the first degree. This indictment was also returned on the identical day, June 20, 1967, by the identical grand jury, and is based upon evidence of the identical witnesses. This criminal proceeding was disposed of after trial before a judge and jury in the State Court with verdict of guilty on June 15,

1968—several days prior to the decision of the federal District Court sought to be reviewed on this appeal.

Besides the hurdle of the Eleventh Amendment, appellants must surmount the even more historic barrier of the Act of 1793—then Rev. Stat. §720 (1878), later Judicial Code §265 (1911) and 28 U.S.C. §379 (1940), and now 28 U.S.C. §2283 (1948). In a single sentence this statute forbids federal court intervention in pending State court proceedings with three exceptions:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In *Hill* v. *Martin*, 296 U.S. 393 (1935), the Court characterized the provisions of this statute—then Judicial Code §265—as a *prohibition*. Said the Court per Mr. Justice Brandeis [296 U.S. at 403]:

> "The prohibition of section 265 is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res adjudicata*."

Another statute almost a century old [Act of April 20, 1871, ch. 2, §1, 17 Stat 13], 42 U.S.C. §1983, contains this single sentence:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Simple inspection of the language of §1983, "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," plainly establishes that it cannot be an exception "expressly authorized by Act of Congress" to the prohibition against federal injunctions of pending State court proceedings contained in §2283. On the face of the two provisions, to read the wide gamut of the totality of federally secured rights, privileges and immunities as outside the federal prohibition would make the exception swallow the rule. Such construction would obliterate the prohibition and for any conceivable practical purpose repeal §2283.

The prohibition embraces federal intervention "to stay proceedings in a State court." The prohibition is silent on the question of prevention by federal intervention of State court proceedings before institution of those proceedings. In *Ex parte Young*, 209 U. S. 123 (1908), the Court treated the unwarranted threat of proceedings as itself a wrong, akin to a trespass. The Court held that the Act of 1793 did not bar the prevention of this wrong so long as actual proceedings in the State court had not begun. Habeas corpus had been brought to secure release of a State attorney general committed to custody by federal court order for alleged contempt. The contempt arose from disobedience of a federal court order enjoining the attorney

general from instituting certain criminal proceedings in a State court under a State statute. The Court held that the State statute was unconstitutional on its face and that the federal court had jurisdiction to issue an injunction under the facts of this case. "If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal Court, that court, as we think is shown by the authorities cited hereafter, has the right to decide it, to the exclusion of all other courts" [209 U. S. at 160]. "But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a State Court" [*id.* at 162].

For 175 years, the Court has observed the prohibition against federal equitable intervention in State court criminal proceedings already commenced and pending. The doctrine of abstention—without reaching the Act of 1793—has been observed for pending State court criminal proceedings involving the Fourth Amendment, *Stefanelli* v. *Minard*, 342 U. S. 111 (1951), as well as rights under the First Amendment, *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943).

With respect to First Amendment rights "which may call for a correspondingly more searching judicial inquiry" [Stone, J., *United States* v. *Carolene Products Co.*, 304 U. S. 144, n. 4 (1938)], in cases not involving the interruption of a pending State criminal proceeding, there has been correspondingly less reluctance of federal courts to intervene and make a constitutional adjudication. See *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967).

*Dombrowski* v. *Pfister*, *supra*, 380 U. S. 479, like *Baggett* and *Keyishian*, involved no pending State court proceeding at the time of application to the district court for federal adjudication. State and local police had arrested under warrants three officials of an organization engaged in civil rights activities in various southern States since the late thirties for alleged violation of a State Subversive Activities and Communist Control Law and Communist Propaganda Control Law. The homes and offices of these officials were searched at gunpoint. The arrest warrants were quashed by a local State court because there was no probable cause for their issuance. Evidence seized at the search was suppressed by the same court on the grounds that the raids were unlawful. Upon this termination of the State criminal proceeding, investigation of the organization was continued by the Chairman of the Legislative Joint Committee on Un-American Activities [Pfister]. That Committee resolved that the organization under investigation was a "Communist front organization" on November 8, 1963, and a grand jury was convened to consider evidence against it. Before the commencement of any criminal proceeding and the return of any indictment, on November 12, 1963, suit was filed in the federal district court for declaratory and injunctive relief against threatened criminal proceedings. This relief was denied. While on appeal, the State grand jury returned indictments under the Subversive Activities and Communist Control Law against the individual appellants. The Court reversed and remanded. In doing so, the Court recognized the prohibition of the Act of Congress [380 U. S. at 484, n. 2]:

"28 U.S.C. §2283 (1958 ed.) provides that:

'A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.'

"The District Court did not suggest that this statute denied power to issue the injunctions sought. This statute and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted. See Ex parte Young, 209 U. S. 123. * * * Since the grand jury was not convened and indictments were not obtained until after the filing of the complaint, which sought interlocutory as well as permanent relief, no state 'proceedings' were pending within the intendment of §2283. To hold otherwise would mean that any threat of prosecution sufficient to justify equitable intervention would also be a 'proceeding' for §2283. Nor are the subsequently obtained indictments 'proceedings' against which injunctive relief is precluded by §2283. The indictments were obtained only because the District Court erroneously dismissed the complaint and dissolved the temporary restraining order issued by Judge Wisdom in aid of the jurisdiction of the District Court properly invoked by the complaint. We therefore find it unnecessary to resolve the question whether suits under 42 U.S.C. §1983 (1958 ed.) come under the 'expressly authorized' exception to §2283."

The dissenting opinion sharpens the point with the observation [380 U. S. at 498, n. 1]:

"If the state criminal prosecution were instituted first, a federal court could not enjoin the state action. 28 U.S.C. §2283 (1958 ed.)."

In sharp contrast to these cases involving loyalty oaths and investigations of membership in allegedly subversive organizations that raise questions of First Amendment rights but that do not involve State criminal proceedings already instituted and pending at the time of application for federal intervention, are the consistent holdings of this Court refusing to authorize federal intervention once a State criminal proceeding has been instituted and is pending. These holdings are unbroken in cases involving First Amendment Rights brought in the federal district court under 42 U.S.C. §1983 and the guidelines laid down in *Dombrowski* v. *Pfister, supra,* 380 U. S. 479.

In *Cameron* v. *Johnson,* 390 U. S. 611 [dec. April 22, 1968], State prosecutions of a clergyman leading a voter registration drive and "40 odd others" were commenced by their arrests on April 9 and 10, 1964, under the Mississippi Unlawful Picketing statute passed unanimously by the Legislature on April 8. Only three days later, on April 13, application was made in the federal district court for declaratory judgment against the statute and for injunction against prosecution pursuant to 42 U.S.C. §1983. The district court denied relief, after considering on the merits whether the prosecution was brought in good faith, but failed to consider the constitutionality of the statute. Upon appeal, the matter was remanded by this Court to consider, among other things, whether the Act of Congress "bars a federal injunction in this case." 381 U. S. 741-742 (1965). The district court on remand held that the statute in question, 28 U.S.C. §2283, prohibited the court from enjoining or abating the criminal prosecutions instituted prior to filing the suit on April 13, 1964, and that a provision of

the Civil Rights Act—42 U.S.C. §1983—created no exception to this prohibition. 262 F. Supp. 873 at 878 (S.D. Miss. 1966). This Court, affirmed, noting however, that it was "unnecessary to resolve either question" with respect to the prohibition. 390 U. S. 611 at ——, n. 3, 88 S. Ct. 1335 at 1337, n. 3, 20 L Ed 2d 182 at 186, n. 3.

In *Zwicker* v. *Boll*, —— U. S. ——, 88 S. Ct. 1666, —— L Ed 2d —— [dec. May 20, 1968], 19 antiwar demonstrators were arrested on a state university campus. State criminal complaints were filed after the arrest charging disorderly conduct. Upon arraignment, all pleaded not guilty. Prior to trial, a complaint was filed under §1983 alleging prosecution in bad faith under a vague and overbroad statute. A three-judge district court panel held no evidentiary hearings but heard legal argument on the vagueness attack. The Court, in a two to one decision, dismissed the suit without reaching any substantive issue because the issues were appropriate for decision in the pending State criminal proceeding. On the question of the prohibition against intervention by Act of Congress, one judge found "no compelling reason why this court should assert power to decide these issues in this action" [270 F. Supp. 131 at 134 (W.D. Wis. 1967)]. The concurring judge found the statute a bar to relief [*id.* at 137]:

> "In my view an act of Congress, 28 U.S.C. §2283, even when read together with 42 U.S.C. §1983, forbids this court from staying the state court actions, and impliedly, at least admonishes us, if it does not prohibit us from superseding, in effect, the state court resolution of these federal issues by issuing a declaratory judgment."

The Supreme Court affirmed without opinion, citing *Cameron* v. *Johnson, supra*, 390 U. S. 611. A single dissenting Justice made this observation on the question of prohibition [—— U. S. —— at —— n. 4, 88 S. Ct. 1666 at 1669 n. 4]:

> "Whether §2283 constitutes a bar to issuance of an injunction is a question the Court has refrained from deciding in circumstances where it appears that an injunction might be improper on other grounds. See Cameron v. Johnson, 390 U. S. 611, ——, n. 3 (majority opinion) 390 U. S. 611, ——, n. 5 (dissenting opinion), 88 S.Ct. 1335, 1337, 1344, 20 L Ed 2d ——."

In *Brooks* v. *Briley*, 391 U. S. 361 [dec. May 20, 1968], a similar suit was filed in the federal district court seeking injunction and declaratory judgment on grounds of vagueness and overbreadth of certain municipal ordinances after arrest and charges in formal warrants of ten persons for disorderly conduct, carrying a dangerous weapon and inciting to riot. A three-judge panel denied relief and dismissed the suit [274 F. Supp. 538, M.D. Tenn. (1967)]. With respect to prohibition by Act of Congress, the court observed [274 F. Supp. at 553]:

> "The weight of authority and the better reasoned approach require a decision that Sec. 2283 prohibits the enjoining of these state proceedings and that Sec. 1983 is not an 'expressly authorized' exception to Sec. 2283. To hold otherwise would be to create a vast exception to Sec. 2283 and would do violence to the principles of comity and federalism which underlie it. Throughout our history the statute and its predecessors have played an important role in our federal system in curtailing 'needless friction between state and federal courts.' Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 9."

On the question of the alternative relief of declaratory judgment, the Court observed [*ibid.*]:

> "Furthermore, it is clear that the prohibition under Sec. 2283 against enjoining state court proceedings cannot be avoided by seeking a declaratory judgment. H. J. Heinz Co. v. Owens, 189 F. 2d 505 (9th Cir. 1951), cert. den. 342 U. S. 905, 72 S.Ct. 294, 96 L.Ed. 677 (1952). The same principles of comity and federalism require that when injunctive relief is not appropriate, neither is relief appropriate under the declaratory judgment statute."

The Supreme Court again affirmed without opinion citing the *Cameron* case, 391 U. S. 361. There was a single dissent, this time without opinion [*ibid.*].

In *Shaw* v. *Garrison*, —— U. S. ——, 89 S. Ct. 453, 21 L. Ed 2d 392 [dec. Dec. 9, 1968], still another suit was filed in a federal district court, this time to enjoin prosecution of an indictment already found for conspiracy to assassinate President John F. Kennedy. The grounds for the intervention were those guidelines laid down in *Dombrowski* and *Cameron*, bad faith prosecution and violation of First Amendment rights. A three-judge federal district court denied relief in opinion [not officially reported, 3 Cr L 352, U.S.D.C., E.D. La., July 23, 1968]. Said the Court [*ibid.*]:

> "There can be no question that the plaintiff has alleged that he is the victim of a prosecution conducted in bad faith. In his complaint he alleges that the defendants have not acted in good faith, but to the contrary, they have charged plaintiff and caused him to be indicted solely and only for the purpose of using him as a vehicle to the forum which they should for their

attacks on the Warren Report. He is a 'patsy' or a 'pawn' in the hands of the defendants, being used by them in furtherance of their false and fraudulent investigation of the Kennedy assassination. Surely, it cannot be doubted that these allegations if proved, would establish that the plaintiff is being prosecuted in bad faith. If the plaintiff's contentions are true, the defendants' conduct in this case would constitute serious bad faith."

Despite numerous allegations contained in the complaint of deprivation of freedom of speech and assembly, the Court found such allegations insufficient basis for federal intervention. Said the Court [3 Cr L 2252 at 2253]:

> "The plaintiff also contends that [the State statute] is violative of the First Amendment to the United States Constitution because it punishes a person for merely expressing his thoughts about committing a crime. However, the statute does not punish a person for saying he would like to commit a crime, but only for entering into an 'agreement or combination' with one or more other persons to commit a crime. Such an agreement is much more than the mere expression of one's thoughts; it is conduct which leads directly to criminal consequences and against which society has the right to protect itself."

With respect to alternate relief by declaratory judgment, the Court held [*ibid.*]:

> "Plaintiff also seeks a declaratory judgment decreeing that * * * the Louisiana conspiracy statute under which he is being prosecuted, is unconstitutional. * * *
>
> "Plaintiff relies principally upon the decision of Zwickler v. Koota, 389 U. S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967), in asserting that he is entitled to independent consideration of this portion of the com-

plaint, regardless of our determination as to the merits of his request for injunctive relief. * * *

"However, despite the language of Zwickler, we entertain serious doubts about the appropriateness of stopping a pending state court prosecution to consider a request of plaintiff for a declaratory judgment as to the constitutionality of * * * the conspiracy statute under which he is being prosecuted. Although Zwickler stated that the doctrine of abstention could not be invoked in the circumstances of that case, it did not nullify the well-settled rule that the Federal Declaratory Judgment Act, 28 U.S.C. Sec. 2201, 2202, is discretionary, rather than mandatory, and declaratory relief may be withheld by the district court in its discretion in appropriate cases. * * *

"Our doubt about the propriety of giving consideration to the request for declaratory relief in the circumstances of this case is based upon our concern that by permitting a defendant to interrupt a state court prosecution to challenge the statute under which he is being prosecuted, we could open the door to constant disruption of state court criminal proceedings. * * *"

The Supreme Court affirmed denial of relief, this time with neither opinion nor dissent. —— U. S. ——, 89 S. Ct. 453.

Appellants recognize in their respective briefs "that *Dombrowski* is distinguishable from the instant case since there the state proceedings had not been initiated prior to the institution of the federal court action, while here the state court proceedings were under way when this action was commenced" [Brief for Samuels *et al.*, p. 28] and "Appellant is aware of the issue as to whether or not 42 U.S.C. §1983, pursuant to which plaintiff lodged his complaint

would authorize the injunction for which he also asks, in view of 28 U.S.C. §2283. * * * It would seem, however, at this juncture that declaratory relief would effect plaintiff-appellant's purpose in calling off the instant prosecution" [Brief for Fernandez, p. 43, n. 34].

With respect to the suggested settlement for declaratory judgment if injunctive relief is barred by Act of Congress, such backdoor evasion of long standing legislative policy against equitable intervention by federal courts into State court proceedings is sufficiently answered in *Brooks* v. *Briley*, *ante* p. ——, 274 F. Supp. 538, *affirmed* 391 U. S. 361, and *Shaw* v. *Garrison*, *ante* p. —, 3 Cr L 2352, *affirmed* —— U. S. ——, 89 S. Ct. 453. See also *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 294 at 301-302 (1943); *Golden* v. *Zwickler*, —— U.S. ——, 37 LW 4185 [dec. March 4, 1969].

If the prohibition of the Act of 1793 is not to be overlooked, it must be repealed or modified if federal intervention in State court proceedings is to be authorized. This raises the question whether change should come from the legislative or judicial branch If from the latter, the instant cases are far from appropriate. They do not involve a race between a prosecutor to the State courthouse and a prospective defendant to the federal courthouse. Rather, these cases concern defendants in a State criminal proceeding who waited almost 9 months before making application to the federal district court. These cases involve defendants who pleaded and participated in almost three score applications and motions in writing [see Appendices B and C, *post*, at A12]—not to mention numerous other oral ones—thus clearly and repeatedly acknowledging the pro-

priety of proceeding in the State tribunal. These cases represent defendants in a criminal proceeding who seek to switch forums when they believe that the tide has turned against them in the first tribunal. For these reasons, and the circumstances of this proceeding in the State court set forth in Point II, *post*, the legislative rule laid down 175 years ago and consistently observed by this Court ought not to be changed by judicial action in these cases.

## POINT II

### Apart from any prohibition by Act of Congress, the federal court in the exercise of discretion should abstain from intervening in this proceeding at this time.

If the Court decides that the Act of 1793 prohibits federal court intervention in State court proceedings instituted and pending, the decision of the District Court below must be affirmed. If the Court either leaves this question undecided or resolves it otherwise, then the doctrine of abstention in the exercise of discretion requires that the District Court refrain from intervening under the circumstances of this case. In *Douglas v. City of Jeannette*, *supra*, 319 U.S. 157, the Court said [319 U.S. at 163-64]:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. * * *

> Where the threatened prosecution is by state officers for alleged violations of state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate'."

See also *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 500 (1941); *Terrace* v. *Thompson*, 263 U.S. 197, 214 (1923).

As formulated in *Dombrowski* v. *Pfister*, *supra*, 380 U.S. 479, the abstention doctrine was deemed inappropriate, when [i] "statutes are justifiably attacked on their face as abridging free expression, or [ii] as applied for the purpose of discouraging protected activities." *Id.* at 489-490.

Guidelines for the application of this rule have been laid down:

(a) By the Court in *Dombrowski*, *supra*, 380 U.S. at 484:

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

(b) By one Justice dissenting in *Cameron* v. *Johnson*, *supra*, 390 U.S. 611 at ——, 20L Ed 2d 182 at 191-92:

> "Dombrowski is strong medicine. It involves interposition of federal power at the threshold stage of the administration of state criminal laws. Dombrowski's remedy is justified only when First Amendment rights, which are basic to our freedom, are imperiled by calculated, deliberate state assault. And those who seek federal intervention bear a heavy burden to show that the State, in prosecuting them, is not engaged in use of its police power for legitimate ends, but is deliberately invoking it to harass or suppress First Amendment rights. Dombrowski should never be invoked when the State is, in substance and truth, engaged in the enforcement of valid criminal laws. Ordinarily, the presumption that the State's motive was law enforcement and not interference with speech or assembly will carry the day."

Under these formulations of the doctrine, no basis exists for any exception to abstention in the exercise of federal court discretion in the instant cases.

**i No "chilling effect" upon future exercise of First Amendment rights by appellants or anyone else could occur under circumstances where the State statutes complained about were repealed and narrowly construed before the instant indictment was returned.**

The entire Penal Law of the State of New York—including the sections complained about in these cases—was repealed and a new comprehensive penal law developed after long study was substituted by statute adopted on July 20, 1965. *II Laws of New York 1965*, ch. 1030, p. 2343. The new statute was on that date scheduled to take effect on September 1, 1967, *id.* ch. 1030, §500.05, p. 2482, and the new Penal Law in fact took effect on that date. By its terms, the new Penal Law governs conduct engaged in subsequent to September 1, 1967, and the former Penal Law governs conduct engaged in prior to that date. New York Penal Law §5.05 (1), (3). The superseding indictment, attacked in this suit, was returned on January 16, 1968—more than four and one-half months after the effective date of repeal of the provisions of the former Penal Law complained about (September 1, 1967) and almost two and one-half years after the enactment of the statute repealing these provisions (July 20, 1965). The superseding indictment concerned conduct of the appellants charged to have occurred between October 1, 1965 and June 21, 1967 (No. 813, 16-34). This conduct, of course, is governed by provisions of the former Penal Law. Clearly, there can be no effect—"chilling" or otherwise—"on free expression of prosecutions initiated and threatened" (*Dombrowski* v. *Pfister*, *supra*, 380 U.S. 479, 487) in these cases, because the statutes upon which the instant indictment was found had been repealed.

In addition, the challenged provisions of the former Penal Law had been interpreted by the highest court of the State as early as May 16, 1967 to require, not merely advocacy or teaching of violent overthrow of government by force and violence, but also an intent to accomplish this overthrow and a clear and present danger that the advocated overthrow may be attempted or accomplished. *People* v. *Epton*, 19 N.Y. 2d 496, 506 (1967), *cert. den. and app. dismissed*, 390 U.S. 29 (1968). The standard there laid down and presently in effect is a stringent one in complete conformity with that adopted by this Court in *Dennis* v. *United States*, 341 U.S. 494 (1951) and *Yates* v. *United States*, 354 U.S. 298 (1957). Thus "the teacher who carries a copy of the Communist Manifesto on a public street" now has the answer "that the statute would not be applied in such a case." *Keyishian* v. *Board of Regents*, *supra*, 385 U.S. 589 at 599.

In *Zwicker* v. *Boll*, *supra*, 391 U.S. 353, a state disorderly conduct statute was challenged as being vague and overbroad. Prior to suit in the district court, the statute had been found constitutional by the highest court of the State. *State* v. *Givens*, 28 Wis. 2d 105, 135 N.W. 2d 780 (1965). The District Court abstained, 270 F. Supp. 131, *supra*. This Court affirmed. 391 U.S. 353.

As the District Court found in these cases below [288 F. Supp. 348 at 355-56 (No. 813, 66-67)]:

> "[T]he need of federal declaratory or injunctive relief to protect plaintiffs' constitutional rights with respect to future conduct or events—is wholly absent here. The presently effective New York criminal an-

archy statute, Penal Law §240.15, read in light of *Epton*, does not unconstitutionally restrict the First Amendment rights of these plaintiffs or of anyone else. * * * the instant plaintiffs will not suffer any impairment of First Amendment rights to denounce the government of the state or its subdivisions if they must wait for a federal answer as regards conduct long since past until the state has determined what acts, alleged to be punishable under the statute and the Constitution, they have in fact committed."

In *Golden* v. *Zwickler*, 37 LW 4185 [dec. March 4, 1969], this Court reversed a decision of a three-judge district court holding a State statute prohibiting distribution in quantity of anonymous political handbills unconstitutional, and remanded the matter with direction to enter a new judgment dismissing the complaint. The court below held "that the challenged statute currently infringes upon [Zwickler's] freedom of speech by deterring him from again distributing anonymous handbills. His own interest as well as that of others who would with like anonymity practice free speech in a political environment persuade us to the justice of his plea." *Zwickler* v. *Koota*, 290 F. Supp. 244 at 248, 249 (E.D.N.Y. 1968). This Court held federal court intervention by declaratory judgment under 28 U.S.C. §2201 erroneous, intimating "no view upon the correctness of the District Court's holding as to the constitutionality of the New York statute"—which, accordingly, remains in continued force and effect.

**ii The prosecution was instituted and conducted in good faith in all respects.**

Allegations in one complaint (No. 813) are that the District Attorney "issued numerous press releases and other public statements relating to the indictment and arrest of" Fernandez, and that press releases "so mixed these two separate indictments as to lead persons to believe that [Fernandez] was charged with conspiracy to commit murder as well as anarchy and conspiracy to commit anarchy" (No. 813, 13). The other complaint (No. 580) alleges that "upon the arraignment of the said [appellants], the [appellee] issued numerous press releases and other public statements relating to the indictment and arrest of the [appellants], which releases and statements were widely reported in newspapers throughout the State of New York" (No. 580, 4a-5a).

No finding of bad faith was made by the District Court below. All questions relating to publicity were raised in the State Court, and these were disposed of with exhaustive examination of all details by decision and opinion of the Court, *sub nom. People* v. *Kourouma* [not officially reported, 159 N.Y.L.J., No. 53, March 18, 1968, pp. 1, col. 3, 21, cols. 2-5; 2 Cr. L. 2490-2492 (March 27, 1968)]. In the opinion of the Court by Shapiro, J., the facts were fully stated. The sole press release issued by the appellee District Attorney is recited in that opinion as follows [159 N.Y.L.J., No. 59, at p. 21, col. 3; 2 Cr. L. 2490, *supra*]:

> "Queens District Attorney Thomas J. Mackell announced this morning the re-arraignment in Supreme Court, Criminal Term, of fifteen defendants in the so-called Revolutionary Action Movement upon a fresh

indictment. The new indictment, found by the grand jury on January 15, 1968, contains forty-eight counts charging five different crimes against fifteen defendants. The new indictment supersedes one of two indictments found by the identical grand jury on June 20, 1967. The original indictment, now superseded, contained seventeen counts of the same five crimes against seventeen defendants.

"The principal modifications of the original indictment, and the reasons for making them, were briefly summarized by District Attorney Mackell:

"(1) The new indictment contains forty-one counts for possession of dangerous instruments and appliances. These counts cover possession of a half-dozen concealable pistols, revolvers, automatics and other hand guns; by five of the defendants (Ellis, Ferguson, Harris, Samuels and Stewart). In addition, possession of thirty-five rifles, double-barrel shotguns and carbines are also charged to these five defendants and an additional five (Haynes, Kourouma, McPherson, Rookard and Taylor). Two of these defendants are charged in the fresh indictment with respective possession of fifteen (Ferguson) and seven guns (Rookard).

"Under the former indictment, there were but ten counts instead of forty-one, and these were charged against seven of the defendants instead of ten of them.

"The reason for the increase in the number of charges and defendants with respect to weapons is based upon events subsequent to the finding of the original indictment.

"(2) Apart from weapons, the original indictment charged commission of the crimes of advocacy of criminal anarchy (one count), conspiracy to advocate criminal anarchy (one count), conspiracy to commit arson (1 count) and permitting premises to be used for assemblages and anarchists (2 counts). The superseding

indictment continues all of these charges, but divides the charge of advocacy of criminal anarchy into three counts, instead of one.

"In addition, in the new indictment, the anarchy conspiracy, nineteen overt acts are set forth, instead of nine in the old indictment; and for the arson conspiracy count, five overt acts instead of four are set forth.

"The other original indictment found by the grand jury on June 20, 1967, against two defendants for conspiracy to commit murder remains undisturbed."

Any statements by the appellee District Attorney and his aides are fully covered in this opinion. With respect to all such statements, the State Court concluded [159 N.Y.L.J., No. 53, p. 5, col. 5; 2 Cr. L. 2490 at 2492, *supra*]:

"Since I have held that the order of the court upon which this proceeding is based was not a 'lawful mandate', there is no reason to assay the nature of the statement by the district attorney complained of in this proceeding. I am constrained, however, to observe that the district attorney did not, in that statement, violate any canon of professional ethics—which of itself has no binding effect on the courts but merely expresses a view of the legal profession (Estes v. Texas, 381 U.S. 534, 535); that the statement contained nothing more than an accurate objective, factual report of proceedings which the district attorney had a perfect right to make and of which the public had a right to be aware, and that by no stretch of the imagination can the report, or what was said by the chief assistant district attorney on television, be deemed unfairly prejudicial to defendants."

No application to review this decision was ever made by appellants, or anyone else.

The appellee District Attorney first learned of this investigation covering the period from October, 1965 to June 1967, in April, 1967. This information pointed unequivocally to the fact that weapons had been amassed, incendiary and explosive devices had been gathered, targets—human and otherwise—had been selected, and precise plans for execution had been formulated. The appellee District Attorney had no conceivable choice but to act. The entire matter was presented by the District Attorney to the Grand Jury on June 20, 1967, and on that day two separate indictments, based upon the testimony of undercover detectives, were returned. The 41 weapons—constituting the basis for 41 counts in the superseding indictment—were seized the day following indictment. This confirmed the information supplied to the Grand Jury and the appellee District Attorney.

Further confirmation of the good faith of the appellee District Attorney to prosecute in order to secure valid convictions is the trial and conviction of Ferguson and Harris, two of the appellants, upon the separate and related indictment of conspiracy to commit the crime of murder in the first degree.

## POINT III

**The challenged statutes, as construed by the highest court of the State prior to this indictment and as applied to the facts in these cases, are constitutional.**

The indictment is aimed, not at any discussion or publication, but rather at the accumulation of an arsenal for the purpose of overthrowing state and local government.

The indictment, brought under the former Penal Law, is for a series of crimes, the overwhelming number of which concern dangerous weapons: [i] possession of weapons and dangerous instruments and appliances (§1897, subd. 2, 3 and 9) in 41 counts, covering four concealable pistols, revolvers, automatics and other handguns, and thirty-seven rifles, double-barrel shotguns and carbines; [ii] advocacy of criminal anarchy (§§160, 161, subd. 1, 2 and 4) [3 counts], conspiracy to advocate criminal anarchy (§§580, subdiv. 1, 161, subd. 1, 2 and 4) [1 count] and permitting premises to be used for assemblage of anarchists (§163) [2 counts]; and [iii] conspiracy to commit arson (§§580-a, 223) [1 count]. Under both the former (§1897, subd. 2 and 3) and current Penal Law (§265.05, subd. 2 and 3), mere possession—without more—of concealable handguns is made criminal, and this covers four counts of the indictment. Under the former (§1897, subd. 9) and current Penal Law (§265.05, subd. 9), possession of rifles, shotguns and similar non-concealable weapons is made criminal only upon proof of "intent to use the same unlawfully against another", and this covers 37 counts of the indictment. The "unlawful intent" for the possession of these weapons contained in 37 counts of the indictment is not predicated upon the usual

purpose of robbery or assault. Rather, the purpose is the overthrow of "the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished." [Ind. No. 134-1968 (No. 813, 17-18, 19).]

Freedom of speech does not include any and every human utterance. As Mr. Justice Holmes said in *Frohwerk* v. *United States*, 249 U.S. 204 at 206 (1919):

> "With regard to that argument we think it necessary to add to what has been said in *Schenck* v. *United States*, *ante*, 47, only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not intended to give immunity for every possible use of language. *Robertson* v. *Baldwin*, 165 U.S. 275, 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

See, also, *Valentine* v. *Chrestensen*, 318 U.S. 52 (1942).

As Mr. Justice Douglas observed in dissent, *Dennis* v. *United States*, 341 U. S. 494 at 581 (1951):

> "If this were a case where those who claimed protection under the First Amendment were teaching • • •

the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of method of terror and other seditious conduct should be beyond the pale along with obscenity and immorality."

The challenged provisions of the New York statutes—§§160, 161 (1), (2), (4), and 163 of the former Penal Law—as construed by *People* v. *Epton*, *supra*, 19 N.Y. 2d 496, *cert. den. and app. dismissed*, 390 U.S. 29, and as applied to the facts of the instant cases, prohibit "teaching * * * the planting of bombs, the art of street warfare, and the like".

Section 160 defined criminal anarchy as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means", and made "the advocacy of such doctrine either by word of mouth or writing" a felony, without, however, prescribing a penalty.

Section 161 defined various types of acts constituting anarchy. Section 163 made a misdemeanor permitting assemblages of two or more persons for advocating or teaching criminal anarchy. Under the new Penal Law, effective September 1, 1967, the various criminal anarchy sections are combined in a single provision reading as follows:

"§240.15 Criminal anarchy

"A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes

any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow."

The provisions of the former Penal Law were upheld as constitutional in *Gitlow* v. *New York*, 268 U.S. 625 (1926), *affirming People* v. *Gitlow*, 234 N.Y. 132 (1922); and in *People* v. *Epton*, *supra*, 19 N.Y. 2d 496, *cert. den. and app. dismissed*, 390 U.S. 29. In *Epton*, *supra*, 19 NY 2d 496, the highest court of the State took note of constitutional developments on First Amendment rights in the forty-five years since its decision in *People* v. *Gitlow*, *supra*, 234 N.Y. 132. That Court adopted the narrowing construction of the "clear and present danger" test announced by Mr. Justice Holmes in *Schenk* v. *United States*, 249 U.S. 47 at 52 (1919). Accordingly, the highest court of the State reached the same conclusion for statutes containing virtually the same language by applying the same test as did this Court in *Dennis* v. *United States*, 341 U.S. 494 (1951) and *Yates* v. *United States*, 354 U.S. 298 (1957). Said the Court [19 NY 2d at 504-506]:

> "When we last considered the constitutionality of sections 160 and 161 of the Penal Law, we held, and the Supreme Court of the United States affirmed over the vigorous objection of Mr. Justice Holmes and Brandeis, that they were constitutional (*People* v. *Gitlow*, *supra*, aff'd *sub nom. Gitlow* v. *New York*, 268 U. S. 652). We are, of course, aware that the Supreme Court's view of the First Amendment's protection of speech has been altered drastically since *Gitlow* was decided. Although *Gitlow* has never been expressly overruled, it is now generally conceded that the Holmes-Brandeis view in *Gitlow* which insisted upon

a showing of 'clear and present danger' before one's freedom of speech may be abridged represents today's law (*Dennis* v. *United States*, 341 U. S. 494; *Yates* v. *United States*, 354 U.S. 298).

"We are thus presented with a statute which is unconstitutional as interpreted. The dissent contends that our decision in *Gitlow* reflects the Legislature's intent to make unlawful the mere advocacy of violent revolution, and that we are bound by our prior decision under the doctrine of *stare decisis*. We cannot agree.

"It must be assumed that the Legislature intended to enact a statute which was in harmony with the United States Constitution and the Constitution of the State of New York (*People* v. *Finkelstein*, 9 N Y 2d 342). When we first interpreted this statute in 1922, we did so in light of the prevailing conditions of that time and in accordance with the current understanding of First Amendment freedoms. As we have noted, reexamination of our First Amendment rights both by our court and the Supreme Court of the United States has resulted in a clearer understanding of the scope of constitutional protection of speech. We have not had an opportunity, however, until now, to reexamine our determination in *Gitlow* in light of the recent developments in constitutional theory. Now that our criminal anarchy statute is again before us, we have the obligation of construing it in accordance with sound constitutional principles so as to preserve its constitutionality. (*People* v. *Finkelstein*, *supra*, p. 345; *Dollar Co.* v. *Canadian Car & Foundry Co.*, 220 N.Y. 270.)

* * *

"What are these sound constitutional requirements which must now be read into our criminal anarchy statute to preserve its constitutionality? It is clear that the prescription of mere advocacy of the violent

overthrow of the Government would be an unconstitutional infringement upon free speech (*Dennis* v. *United States, supra*). The advocacy of the overthrow of the Government by force and violence must be accompanied by an intent to accomplish the overthrow (*Dennis* v. *United States, supra; Kegishian* v. *Board of Regents,* 385 U. S. 589) and there must be a 'clear and present danger' that the advocated overthrow may be attempted or accomplished (*Dennis* v. *United States, supra*)."

The question of the reality of an imminent, actual threat to the overthrow of local government by less than a score of Queens residents trained in sabotage and assassination has been answered by this Court in *Ex parte Quirin*, 317 U.S. 1 (1942). In that case, the Court denied habeas corpus and upheld a military commission trial of nine persons landed by two submarines of the German Government in New York and Florida. The purpose of this handful of men was "to destroy war industries and war facilities in the United States" [*id.* at 21].

With respect to notice of a narrower construction of the statute by a court, this Court long ago stated the familiar rule that such "interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature", and this "construction fixes the meaning of the statute", even in the very case in which the construction is made for the first time. *Winters* v. *New York*, 333 U.S. 507 at 514 (1948). In the instant case, the conduct alleged to be criminal was charged to have been engaged in between October, 1965 and June, 1967. *Epton* —in whose case the narrow construction applicable to these cases was made—was actually arrested and charged with

criminal anarchy in July 1964, tried and convicted of that crime in January, 1966 and his conviction was affirmed by an intermediate appellate court in December, 1966. The highest court of the State granted leave to appeal during the same month and reached its decision with opinion on May 16, 1967—more than a month before the first indictment in these cases was returned.

No one sanely can doubt that the statutes challenged as overbroad in these cases certainly included the "hard core" activities embraced in this indictment, thereby giving fair warning in advance.

## POINT IV

**The indictment explicitly charging activities directed against "the governments of the State of New York and its various subdivisions and agencies" does not constitute State action preempted by federal legislation.**

Whenever reference is made in the indictment to the overthrow of organized government, "organized government" is explicitly limited, "to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence" (No. 813, 17, 18, 19, 24, 25).

The challenged statutes dealing with criminal anarchy have been restricted by the highest court of the State to "activity directed against a State or local government," *People* v. *Epton, supra,* 19 NY 2d 496 at 507, and accordingly, taken with the explicitly qualified indictment, cannot

directly collide with any act of Congress prohibiting sedition against the federal government, and are unlikely to enter any field chartered by Congress for exclusive occupation by the federal government.

In *Commonwealth* v. *Nelson*, 377 Pa. 58, 104 A. 2d 133 at 139 (1954), the highest court of a State, considering a conviction under a State sedition statute, pointed out, "[W]e have not found, nor has anyone pointed to, a single word indicating a seditious act or even utterance directed against the Government of Pennsylvania." The State court reversed on the ground that the Smith Act [18 U.S.C. §2385] superseded the enforceability of the State statute proscribing the same conduct. This Court affirmed. *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956).

In *Uphaus* v. *Wyman*, 360 U.S. 72 at 76-77 (1959), the Court explained its decision in *Nelson*:

> "The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made clear that a State could proceed with prosecutions for sedition against the State itself; that it can legitimately investigate in this area follows a fortiori * * *. Nor did our opinion in Nelson hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.' In footnote 8 of the opinion it is pointed out that the State had full power to deal with internal civil disturbances. Thus registration statutes, quo warranto proceedings as to subversive corporations, the subversive instigation of riots and a host of other subjects directly affecting state security furnish grist for the State's legislative mill."

See also *De Gregory* v. *Attorney General of New Hampshire*, 383 U.S. 825 at 829-830 (1966).

Forty-four States, including New York, by statute make criminal the advocacy of the overthrow of government by force or violence or other unlawful means [statutes collected, *Internal Security and Subversion* by American Law Division, Library of Congress (1965) at 439]. Like the highest court of the State of New York [*People* v. *Epton*, *supra*, 19 N Y 2d 496 at 507], a host of opinions of the highest courts of these States has upheld their own statutes by construing them so as to meet the requirements of the Supremacy Clause as laid down by the Court in *Pennsylvania* v. *Nelson*, *supra*, 350 U.S. 497 (opinions collected, *Internal Security and Subversion*, *op. cit.*, *passim*].

The indictment charges appellants with possession of dangerous weapons and instruments and appliances, and the planned "use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials" (No. 813, 17, 18, 19, 20). These charges involve activities as much outside the pale of federal jurisdiction as they impose upon local law enforcement the grave obligation of the defense of the executive officials and peace officers of local government and the protection of transportation and other facilities owned and operated by local government.

So long as the States in these decisions on the Supremacy Clause observe the "clear and present danger" test,

first enunciated a half-century ago in *Schenck* v. *United States, supra,* 249 U.S. 47 at 52, and followed by the Court in *Dennis* v. *United States, supra,* 341 U.S. 494 and *Yates* v. *United States, supra,* 354 U.S. 298, premature intervention by federal district courts cannot be justified in State criminal proceedings. Any basis for such intervention claimed under *Dombrowski* v. *Pfister, supra,* 380 U.S. 479, rests squarely upon rights guaranteed by the First Amendment, and not upon considerations posed by Articles VI [second sentence, first clause] of the Constitution.

## POINT V

**A property qualification for jurors—never observed in their selection for a generation and since repealed—does not justify federal intervention by injunction or declaratory judgment in the middle of State court criminal proceedings.**

In more than a century since adoption of the Fourteenth Amendment, this Court has never authorized federal court intervention in the middle of a court proceeding—federal or State, civil or criminal—on the grounds of discrimination in the selection of jurors—grand or petit.

The first claim involving rights of humans, as opposed to business corporations, in State criminal proceedings, ever to be sustained by this Court pursuant to the century old Fourteenth Amendment, concerned discrimination in selection of trial jurors under the equal protection of the laws clause. That discrimination was along racial lines and the claim was upheld a decade after adoption of the Amendment. *Strauder* v. *West Virginia,* 100 U.S. 303

(1879). More than a generation passed until other claims involving human rights in State criminal proceedings were to be sustained by the Court. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). See *Role of the Prosecutor in a Fair Trial*, 41 Minn. L. Rev. 602, 603-605 (1958). This Court has not authorized any federal district court to intervene in a pending State criminal prosecution on the grounds of discrimination in the selection of jurors—whether grand or petit, and whether on the basis of race, color, creed, sex or economic status. Nothing contained in the guidelines of *Dombrowski* v. *Pfister*, *supra*, 380 U.S. 479, relating to First Amendment rights, sanction district court intervention in pending State criminal proceedings on the procedural grounds of the composition of a jury.

An anachronistic provision of the statutes of New York, traceable to a century old enactment [Laws of New York, 1870, ch. 539, §10, later Judiciary Law §596, subd. 3], required ownership of real or personal property of the value of $250 by the prospective juror, or his or her spouse, and was repealed by statute, which became law on March 7, 1967 [Laws of New York, 1967, ch. 49, §1, at 68]. This statute took effect on September 1, 1967 [*id.* §4], and accordingly did not expressly govern the impanelling of the grand jury that returned the instant indictment. However, the State official responsible for selection of jurors swears that in his "30 years experience interviewing" prospective jurors, "there has never been a single individual responding by subpoena who has been rejected solely by reason of not having the aforesaid sum, either in real or personal property. There has been, in the past, out of this huge number, perhaps a few instances where an individual might have said that he lacked the sum. But when he was asked

whether he considered the value of his personal property, such as clothing, household equipment and all other types of personal possessions, it became apparent to him that he was the possessor of that amount and in each case he was accepted as a prospective juror" (No. 813, 42).

Absolutely nothing in any of the lengthy State court proceedings in these cases indicates selection of any grand juror on the basis of discrimination along any lines—property, sex, color, religion or race, and, accordingly the District Court below could find no such discrimination. 288 F. Supp. 348 at 356-357 (No. 813, 68-69).

## Conclusion

***The judgment of the District Court below dismissing the complaints should be affirmed in all respects.***

Respectfully submitted,

THOMAS J. MACKELL
*District Attorney, Queens County*
*Appearing pro se*

FREDERICK J. LUDWIG
Chief Assistant District Attorney
*Of Counsel*